COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Order Instituting Rulemaking)

to Promulgate Regulations)

Governing an Expedited) D.T.E. 00-39

Dispute Resolution Process for)

Complaints Involving)

Telecommunications Carriers)

JOINT COMMENTS OF

MGC COMMUNICATIONS, INC.

d/b/a MPOWER COMMUNICATIONS CORPORATION,

RCN TELECOM SERVICES, INC. AND

VITTS NETWORKS

June 28, 2000

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By notice dated June 5, 2000, the Massachusetts Department of Telecommunications and Energy ("D.T.E."), requested comments on a rulemaking proceeding promulgating proposed regulations to govern an expedited dispute resolution process for complaints involving competing telecommunications carriers. MGC Communications, Inc. d/b/a/

Mpower Communications Corporation, RCN Telecom Services, Inc., and Vitts Networks, (collectively "Joint Commenters"), by their undersigned counsel, hereby respectfully submit the following comments in response to the D.T.E.'s request.

I. INTRODUCTION

Joint Commenters support the D.T.E.'s efforts to improve the efficiency of the formal complaint process and to facilitate increased competition for telecommunications services by offering an option for prompt resolution of disputes between carriers. As competitive providers of telecommunications services, Joint Commenters are uniquely aware of the financial and competitive pressures inherent in an extended complaint resolution process. Incumbent providers are also aware of the pressures placed upon competitive providers in an extended complaint resolution process and may use the process to force competitive providers to expend as much time and resources as possible.

The proposed expedited dispute resolution process will serve to mitigate the ability of incumbent providers to game the system, by reducing, but not removing, the costs and extensive delays that incumbents have used to their advantage. The proposed expedited dispute resolution process will thus deter incumbents from using the dispute process to their competitive advantage and encourage resolution before complaints are made to the D.T.E. Incumbents will realize that they cannot extend the process and win disputes simply because they have superior resources. The speed, efficiency, and predictability of an expedited dispute resolution process will undoubtedly serve to facilitate competition for telecommunications services in Massachusetts.

II. The D.T.E. Should Clarify That Only One Party to the Dispute Needs to Request Admission Onto the Accelerated Docket.

Section 15.04 (1) of the proposed regulations provides that "[b]oth (or all) parties to a dispute need not agree to the expedited process; it is sufficient that only one party so select." However, this seems to conflict with §15.04 (3) which states that "[i]n order to be eligible to file for expedited review, the parties to the dispute must demonstrate that they attempted in good faith to resolve their dispute between themselves for a minimum period of ten days prior to petitioning the Department." (emphasis supplied). Joint Commenters urge the Commission to clarify that only the party seeking admission onto the Accelerated Docket needs to demonstrate that it has made a good faith attempt to resolve the dispute.

Absent such a clarification, the offending party could avoid admission to the Accelerated Docket and continue to benefit from its violation of D.T.E. regulations by simply refusing any attempt at a good faith resolution. Such a result would frustrate the D.T.E' s purpose in creating the Accelerated Docket, and would force the non-violating party to incur the additional cost and delay of an extended complaint resolution process. Additionally, such

a result would deny the citizens of Massachusetts the benefits of competition that they would otherwise enjoy as competitive providers are forced to spend their resources on litigation instead of competition.

As currently drafted, the proposed regulation does not establish what action by a party will be sufficient to constitute the necessary "demonstration" that a good faith attempt has been made to resolve the dispute. Failure to adopt a uniform standard for the requisite demonstration may result in future litigation and delay over whether such demonstration has been made. Joint Commenters urge adoption of a standard, analogous to 47 C.F.R. 1.721(a)(8), whereby the requisite demonstration is made by including (i) a statement, that prior to the filing for expedited review, the party seeking expedited review mailed a certified letter outlining the allegations that form the basis of its anticipated filing with the D.T.E. to the opposing carrier that invited a response within a reasonable period of time; and (ii) a brief summary of all additional steps taken to resolve the dispute prior to filing of the complaint. If no additional steps were taken, such demonstration shall state the reason(s) why the party believed such steps would be fruitless.

III. REQUESTS FOR ADMISSION ONTO THE ACCELERATED DOCKET SHOULD BE SERVED ON ALL PARTIES SIMULTANEOUSLY

Under § 15.03(2) of the proposed regulations, "[a]ny party that contemplates filing a formal

complaint may submit a request to the Director of the Telecommunications Division, in writing, seeking inclusion of its complaint, once filed on the Accelerated Docket." Joint Commenters urge the D.T.E. to require that such requests be simultaneously served on the defendant. In conjunction with these rules, the D.T.E should establish and maintain an electronic directory - - available on the D.T.E.'s web page - - of agents authorized to receive service of complaint on behalf of carriers that are subject to the D.T.E.'s jurisdiction. These measures will protect the due process rights of affected carriers and increase the speed and efficiency of the expedited dispute resolution process.

IV. THE D.T.E. SHOULD PROMULGATE PROCEDURES FOR TRANSFERRING DISPUTES ONTO THE ACCELERATED DOCKET.

Under proposed regulation §15.04(4) "[i]f it appears at any time that a proceeding on the Accelerated Docket is no longer appropriate for such treatment, Department Staff may remove the matter from the Accelerated Docket either on its own motion or at the request of any party." Joint Commenters recommend adoption of an analogous provision providing for transferring cases onto the Accelerated Docket if it appears that the dispute

is appropriate for such treatment. Department Staff should be able to move such disputes onto the Accelerated Docket either on their own motion or at the request of any party.

V. LIABILITY AND DAMAGES PHASES OF THE COMPLAINT PROCESS SHOULD BE BIFURCATED

Joint Commenters propose that the D.T.E. promulgate regulations allowing the bifurcation of the liability and damages phases of the Accelerated Docket process. For competitive carriers the most pressing need is for prospective relief and immediate removal of barriers to competition. Such relief may be unnecessarily delayed if procedurally tied to proceedings to determine compensation for past injuries. In bifurcated proceedings, the D.T.E. and the parties can initially focus on the liability aspect of the case. If there is a finding of no liability, the time and resources that otherwise would have been spent on damages will be saved. Moreover, bifurcation will reduce the number and complexity of issues that must be decided within the accelerated deadlines.

Should the D.T.E. promulgate regulations providing for the bifurcation of the liability and damages phases of disputes admitted onto the Accelerated Docket, Joint Commenters encourage the promulgation of a rule providing for a limited time period between the bifurcated phases of a case to encourage settlement. During the hiatus, the parties should be encouraged to take part in settlement discussions under the supervision of D.T.E. Staff.

VI. PARTIES SHOULD BE REQUIRED TO PRODUCE ALL RELEVANT DOCUMENTS.

Joint Commenters believe that answers responding to allegations in the complaint, any initial pleading and any reply statements in a "pre-initial-status-conference filing" should be accompanied by all relevant documents. Section 15.05(4) of the proposed regulations pertaining to the answer and complaint, provides that "[t]he answer shall include all documents in the respondent's control that are likely to bear significantly on the issues in the complaint proceeding." An analogous requirement pertaining to discovery is found under §15.06(1), which provides in pertinent part as follows:

Each party to an Accelerated Docket proceeding shall serve on the other parties,

with its initial pleading and with any reply statement in a pre-initial-status-conference

filing, copies of all documents in the possession, custody or control of the party

that are likely to bear significantly on any claim or defense.

Joint Commenters believe that all relevant documents should be disclosed. The relevance standard is already defined in the law pertaining to discovery, and any limitation beyond relevance may permit parties to inappropriately self-censor discovery. This result could occur particularly in cases where defendant carrier has sole possession and control of critical information. Moreover, the burden of identifying and producing of relevant documents is not significantly greater than the burden of identifying and producing documents "likely to bear significantly on any claim or defense" as proposed under § 15.05(4).

VII. CONCLUSION

Joint Commenters applaud the D.T.E.'s efforts to facilitate increased competition for telecommunications services by adopting an expedited dispute resolution process for complaints involving competing telecommunications carriers.

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